

In evaluating securities law compliance issues, family offices and their legal advisors typically start with an examination of the investment adviser registration requirements under the Investment Advisers Act of 1940, as amended – and rightfully so.

The Securities and Exchange Commission has adopted rules under the Advisers Act that provide family offices with relief from the Act's complex (and public) investment adviser registration requirements¹. We discussed the parameters of the Advisers Act's "family office exclusion" in more detail in an earlier Family Office Insight,² but, in general, a family office is exempt from registration as an investment adviser under the Advisers Act if it:

- Provides investment advice only to "family clients" (within in the meaning of the Advisers Act's complex definition of that term);
- Is wholly owned by family clients and exclusively controlled by family members and/or certain family entities
- Does not hold itself out to the public as an investment adviser

Effective in January 2020, the Commodities and Futures Trading Commission codified its staff's existing advice by formally exempting family offices (using the Advisers Act's definition) from registration as commodity pool operators or commodity trading advisors and waiving the provisions of its regulations that otherwise would impose an obligation to file a notice in order to claim that exemption.

There is also an investment adviser registration regime at the state level. State investment adviser registration applies most frequently to investment advisers whose assets under management fall below the Advisers Act's size thresholds – investment advisers who are considered "small" or "mid-sized" under the Advisers Act are generally required to register with one or more state securities authorities. However, many states³ have adopted rules that provide exemptions from their state-law investment adviser registration requirements for family offices that parallel the exemption in the Advisers Act, in order to harmonize their regulatory regimes to the Advisers Act's rules.

All of this is good news for single family offices on the securities regulatory front. There are, however, other aspects of the US securities laws that still apply to family offices, even if the family office is exempt from registration under the Advisers Act. One such potential trap is the "institutional investment manager" filing requirement contained in Section 13(f) of the Securities Exchange Act of 1934, as amended.

Section 13(f) requires any "institutional investment manager" that exercises investment discretion over the accounts of any other person holding "section 13(f) securities"⁴ that have an aggregate fair market value of at least US\$100 million to make certain periodic filings with the SEC on Form 13F. The potential "trap" for family offices here is that Section 13(f) applies to all "institutional investment managers" – regardless of whether they are registered investment advisers under the Advisers Act. Unlike the Advisers Act, Section 13(f) does not exempt family offices: with the result that a family office, even if it is exempt from registration under the Advisers Act, may nevertheless be an "institutional investment manager" for purposes of Section 13(f) and, therefore, be required to comply with the Form 13F filing requirements.

The interplay between Federal and state investment adviser regulation and the Exchange Act's rules regarding the regulation of trading markets is complex. Family offices and their professional advisors need to consider the applicability of the full range of securities laws as part of an effective and comprehensive compliance program.

Please contact your principal firm lawyer or any of the lawyers listed in this publication for additional information or for help on these matters.

Contacts

Daniel G. Berick

Partner, Cleveland
T +1 216 479 8374
E daniel.berick@squirepb.com

Fred A. Summer

Senior Counsel, Columbus
T+1 614 365 2743
E fred.summer@squirepb.com

Jian (Brenda) Xu

Principal, Los Angeles
T +1 213 689 5153
E brenda.xu@squirepb.com

1 17 CFR § 275.202(a)(11)(G)-1.

2 www.squirepattonboggs.com/en/insights/publications/2017/06/family-office-insights-the-family-office-rule-under-the-investment-advisers-act

3 For example, California [California Corporations Code § 25009.1] and Texas [Texas Administrative Code Rule 116.1(b) (2) (iii)].

4 Generally speaking, these are equity securities that are traded on a securities exchange, certain equity options and warrants, shares of closed-end investment companies, and certain convertible debt securities.